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THE AMERICAN COMMONWEALTH:

CHANGES IN ITS RELATION TO THE NATION.

IN an able article upon the study of history in the universities of Scotland and England, published in the summer number of the *Revue Internationale de l'Enseignement* for the year 1885, Professor Paul Fredericq of the University of Ghent reports a conversation with the Regius Professor of History at Cambridge, the celebrated J. R. Seeley, a part of which expresses, concisely and exactly, the purpose of this paper. "It is my great aim and desire," declared the Professor, "to arouse a skepticism in politics. Here in England no one entertains any doubt in reference to the political creed, while all the world is heretic in religion."

If this be true of England and the English, to an infinitely higher degree is it true of us. In the invaluable work upon our constitutional history by the German Professor von Holst, an entire chapter—the second of the first volume—is devoted to the consideration of what he terms "the canonizing of the constitution," *i.e.*, the making of a political bible out of it—all doubts as to the absolute truth and perfection of which were regarded as greater heresies than Arianism or Sabellianism, Gnosticism or Agnosticism. The irony of the learned Professor is certainly merited. During the first decades of this century, the never changing aspect of the Nation's leaders, mutely prostrate in credulous worship before the great fetish of our Political System, is, to say the least, touching. One would think, now, that the events of 1832 ought to have excited some slight incredulity. But read the remarks made by Governor Hamilton of South Carolina when he took his seat as President of the Nullification Convention:

Our present circumstances are a commentary on the safety and beauty of our constitution. In other countries we should render our-

selves obnoxious to the charge of an attempt to disturb and change the very elements of government. Here all goes on with tranquillity and with the harmony of the spheres themselves.¹

On the very eve of the great Rebellion, few saw that we were approaching an immense change in our "immutable" political system, and at its close the ex-vice-president of the defunct Confederacy, the most fair-minded and conscientious man connected with the movement, wrote a book of two volumes² to prove that those terrible years of bloodshed and destruction were no *attentat* upon our system. It will be remembered how anxious the great Lincoln was, throughout the entire course of that struggle, to represent the conflict, not as between the Union and the states, but as between the government of the United States and certain unlawful combinations of individuals who had usurped the powers of the state governments in certain localities.³ He, too, with all his far-sightedness, seemed to hold to the principle of the indestructibility of the states and the immutability of their relation to the Nation. Perhaps not. He sometimes spoke of the states as the creatures of the Union or Nation.⁴ Perhaps he was only using these catch-words of our political catechism to avoid offending the fundamental tenets of our political orthodoxy. Still, if Lincoln had any one quality which was supreme over all the rest, it was the absolute truthfulness of his language to his conviction. And now, after the smoke of the battle has cleared away and we have had opportunity to count the results, the same refrain greets our ears from the platform of the orator, the columns of the journals, the halls of legislatures and conventions, and even the forums of justice and supreme interpretation. In the great case of Texas *versus* White,⁵ decided in the December term of 1868, Chief Justice Chase, one of Lincoln's most trusted

¹ Niles Register, XLIII., p. 219. Von Holst, *Verfassung und Demokratie der Vereinigten Staaten*, Bd. I., S. 56.

² A Constitutional View of the Late War between the States.

³ Lincoln's Proclamations of April 15, 1861, and Dec. 8, 1863.

⁴ Message, July 4, 1861.

⁵ U. S. Reports. Wallace, vol. 7, p. 700 ff.

advisers, declared that the acts constituting the Rebellion were the unlawful acts of usurping state-governments and not the acts of the states themselves, since the political system of the United States is an indestructible union of indestructible states. This language has been repeated in that august tribunal from that day to this, until, in the recent Virginia Coupon Cases,¹ Mr. Justice Matthews gives vent to his judicial oratory in the following remarkable outburst :

The states are ideal persons — intangible, invisible, immutable ; the state-governments are agents, and within the sphere of the agency perfect representations, but, outside of that, lawless usurpations. This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism ; free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the state to declare and decree that he is the state — to say, *l'état c'est moi*. Of what avail are written constitutions, whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend and enforce them, and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders who are the instruments of wrong, whenever they interpose the shield of the state? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple and naked, and of communism, which is its twin ; the double progeny of the same evil birth.

There may be reason in all this, and logic too, as well as rhetoric ; but I must confess that to me it is about as intelligible as proverbs to Dundreary. To my humble comprehension, Dogberry's charge to the watchmen in *Much Ado* is a model of coherence and consequence when compared with this. It is evident that the learned justice had soared high enough to

¹ U. S. Reports, vol. 114, p. 290 ff., Oct. term of 1884.

touch the clouds — as some of his more practical brethren, in their dissenting opinion, seemed to think.¹

Now it seems to me that the great vitiating principle of the most of our political and judicial reasoning is this dogma that our political system is an indestructible union of immutable states; and it is in reference to this dogma that I shall endeavor to excite skepticism. I shall undertake to show, in the first place, that the perpetuity of our Union depends primarily upon the existence of certain geographical relations and ethnical conditions; and, in the second place, that the doctrine of the indestructibility and immutability of the states is an abstraction which has no warrant either in history or present fact or tendency.

The volumes which have been written and spoken upon these two cardinal doctrines view the subject almost exclusively from the standpoint of the constitution. The *constitution* sets no period to the existence of the Union — therefore it is perpetual; the *constitution* reserves the rights of the states — therefore they are indestructible and immutable. The fundamental fallacy in such reasoning springs from regarding the constitution as the *creator* of these relations instead of as an attempt to express them in human speech and legitimize them by common consent. The constitution of the old Confederation of 1781 used stronger language in reference to the perpetuity of the Union² than our present instrument, and yet in less than a decade it was laid with the things of the past. The Union Act for the German states of 1815 declared indissolubility³ as the first principle of the system; and yet, after forty years of impotence, the Union thus nominally created fell asunder, and the system it expressed disappeared in the smoke of the Seven Days' War. I might easily occupy the entire space assigned to this paper in citing the instances of history which show that

¹ U. S. Reports, vol. 114, p. 330 ff.

² Articles of Confederation, art. xiii. I place the date 1781 instead of 1777, because the former was the date of final ratification and organization under the articles of Confederation.

³ Deutsche Bundesacte, art. 5, Schlussacte.

a political system cannot be perpetuated simply through the guaranty contained in its written constitution.

We must go back of the constitution into the domains of geography and ethnography, the womb of constitutions and of revolutions, and ask there for the principle of perpetuity in any political union. The answer comes to us, if we have but the ear to catch it, quick and sharp and decisive: that a population of an ethnic unity inhabiting a territory of a geographic unity constitutes a distinct nationality, and *nationality* is the condition of political perpetuity; more fully, that a population, speaking a common language and having common ideas as to the fundamental principles of rights and wrongs, and resident upon a territory separated by high mountain-ranges or broad bodies of water or by climatic differences from other territory, presents us with the natural basis of a true and permanent political establishment; and the further the departure from these conditions, the greater is the danger of ultimate dissolution.

Now let us turn to our histories and see if this answer does not meet with complete verification—see if the historic fact did not first awaken the consciousness of the ethnologic principle. Let us take, in brief survey, the evolution of the European states of the present. Let us begin with the more than thousand petty tribes of Latins, Celts and Teutons, and follow the gradual combinations of these until at length Rome stretches her imperial authority over the most of them, and pursues the well thought-out policy of subjecting all to her sway. Read the declarations of her statesmen and her churchmen: they have but a single tone, and express but a single sentiment, *viz.*, that the Roman Empire is the God-established system for Europe, and must endure so long as time shall last. But no, this was not true. Five centuries from the day upon which Julius crossed the Rubicon it was in ruins, and Europe was in anarchy. The resistance of Teutonic nationality destroyed the system of united Europe under the leadership of Rome.

Slowly and painfully, through three hundred years of thought and action, the great work of reorganization was accomplished, and Europe was once more a united state under the leadership

of the German Franks. Gauls, Germans, and Romans, kings, nobles, bishops, and people had participated in the labor of this new creation, and all pronounced it perpetual; the restoration of the empire of Augustus, the everlasting kingdom of God upon earth. But in less than forty-four years from the day when Leo set the crown of Cæsar upon the brow of the great Charles, the unity of Europe was again dissolved. The national distinctions and antitheses between Italians, Germans, and Kelto-Romans or French had become too well established in both thought and language to admit of *any* political union. Europe was not, indeed, led back into the universal anarchy of the fifth century. On the other hand, she had found now the principle of political perpetuity in the independence and unity of the nation. Of course the first adjustments were crude and faulty. They did justice to national differences only in the rough. They looked too much to the satisfaction of dynastic claims. First, they connected the valleys of the Rhone, Saone, Mosel, Meuse, Rhine, and Scheldt with Italy; but these were not Italian either in geography or population, and in twenty-seven years that connection was severed, and these lands set off upon the right and the left, in nearer correspondence with national affinity. Then the inability of Italy to establish a national system, because of the conflict of Lombards, Greeks, Saracens, and Normans within this territory for the supremacy, and because of the policy of the bishops of Rome to make Rome and the properties of the bishopric an independent state, enabled Germany to establish the eight hundred and forty-four years of German domination in Italy, which, while it gave to Italy Germanic vigor and to Germany Italian culture, delayed by so much the nationalization of the political systems of both. Again, they called this Holy Roman Empire of the German Nation perpetual — the everlasting Christian state — but in less than four centuries its life and energy were exhausted beyond any power of resuscitation. Slowly but surely it went to decay, and at the touch of Bonaparte's sword it fell into fragments. But the great conqueror himself could not unite it with France in the universal empire which he had planned. The feeling of

national independence resisted again successfully the system of a united state of Europe, even though it came with the specious offer of destroying princely rule, and conferring liberties upon the people never before enjoyed. And when, after Leipsic and Waterloo, the princes patched up the systems of Germany and Italy at Vienna, they denationalized both, by leaving the half-Slavic half-German Austria with the leadership in both. They, too, called their work perpetual¹ and immutable, and placed it under the guaranty of all Europe. But within less than half a century, the national sentiment expelled Austria from both Italy and Germany, and reorganized their political systems upon a truly national basis; and to-day Austria herself is threatened with dissolution because she has no national unity, and does not seem able to produce one by successful amalgamation.

Now *we* do not live under any other heavens, nor are we directed by any other providence or nature; and the question of the perpetuity of our Union is the question as to the natural unity of our territory, and the homogeneity of our people. Is our population substantially one in language and in the fundamental ideas of rights and wrongs? and is our territory substantially a geographic unity? The answer to these inquiries is neither easy nor certain. Take the last first. This side of the Rocky Mountains, it would seem that our territory satisfies the physical requirements of political unity. The mass of it is the great valley of the Mississippi and its tributaries. But how is it in reference to that which lies beyond the great chain. Mr. Webster regarded it, at the time of its connection with us, as the Asia of our territory;² and so it is. Its formation, climate, and scenery favor the pastoral economy and the patriarchal politic; and the perpetuity of its connection with the great empire on the east depends upon the power of the eastern civilization to overcome those physical influences. Now take the other question: Is our population substantially one in language and in the fundamental ideas of rights and wrongs? We can say in reply, that we are substantially though not exclusively an English-speaking people; and this, with freedom and

¹ Deutsche Bundesacte, art. 5, Schlussacte. ² 7th of March speech.

facility of intercourse, is the mightiest force in producing unity of nationality; but are we one in our philosophy of rights and wrongs? It is here that the variety of race seems to have produced the greatest aberration. We all know that the slavery of the African race occasioned the development of a view of civil rights and of government altogether contradictory to that held where this relation between the superior race and the inferior did not exist. And now the appearance of the Mongol in the far west threatens the repetition, in some degree, of that same experience. In addition to race differences, there are other things which have become, and threaten to become still more, disturbing elements in the development of a national consciousness of rights and wrongs, *e.g.*, the silver-mines and the Mormonism of our Asia. The influences exerted by both are confusing and corrupting forces, and enemies dire to honor in both man and woman. Shall we be able now to expel these powers of dissolution and decay through the development of a powerful national morality, and thus solve successfully and completely the great ethnical question upon which our national perpetuity depends? I hope so; I believe so; but I do not know. Of one thing I feel certain, however, that if we would accomplish this great end surely and speedily, we must not be in a hurry about erecting any more of that territory into commonwealths or, as the common parlance would have it, states.

To bestow upon the residents of a territory, no matter how numerous they may be, the powers of local self-government and of participation in the national government, before they have the moral and intellectual qualities which warrant it, is in my opinion a political crime. It is not only the right, but the duty of the Congress, as the interpreter of the Nation's political consciousness, to withhold such powers until it is clearly manifest that their bestowal will not result in unrepUBLICanism and unnationalism. The claim of a *right* by the population of any part of our territory to become a commonwealth or state rests upon a vicious doctrine in regard to the origin of rights. The right of government over such populations is wholly in the Nation; and what they may receive from time to time of govern-

mental powers is derived from the Nation's grant through the Congress; and the Congress is bound to take care in the making of such grants not to denationalize the Nation. Every student of political and legal science should divest himself, at the outset, of this pernicious doctrine of natural rights, according to which each individual or the population of any section is practically authorized to determine in what his or its rights consist. Natural rights are at best but the ethical feeling as to what rights should be, and the more individual or particularistic that feeling is, the less, as a rule, is it to be trusted; while the more general it is, the more is it to be relied upon; and when it originates in the Nation's consciousness, it has the moral persuasiveness behind it which influences the Nation's *will* to transform it into rights. Until this happens, however, the assertion of rights is but an ignorant boast or a disloyal threat.

It was not, however, the doctrine of rights, nor principally that of the indissolubility of the Union, that I proposed to expound or criticise, but the dogma of the indestructibility and immutability of the commonwealths under this Union. The special purpose with which I started out, and to which I shall now return, was to indicate the present position of the commonwealths in our system, and their probable position in the near future; and I know of no other way to accomplish this purpose than to review the history of their relation to the Nation from the beginning, and see if, instead of immutability, there has not been constant mutability and general tendency towards a certain end. The great mistake usually made in the presentation of our constitutional history is beginning at too recent a date. The formation of the constitution of 1787 is commonly regarded as the starting-point, and all that went before is generally not counted for much, or ignored altogether. This has a reason, of course, and I think it is the confused idea of the American mind that the government of the English crown over the colonies was all usurpation, and therefore not to be taken into account; but this is *borné*, not to say silly. We must begin with the beginning, whatever and wherever that may be, if we would attain a proper comprehension of any subject. The beginning, in this

case, is the act of the English King issuing patents to certain combinations of individuals, making them corporations, granting to them the property in loosely-defined savage territory, and vesting in them certain limited powers of local government over the population which they might induce to settle upon it. The *crown* was, therefore, the centre of unity, from which the colonial establishments all proceeded, and to which they were all subject; and they were provinces whose boundaries were lines of property grants and administrative convenience, and in which such powers of local self-government were exercised as the crown was pleased to confer in the patents, and through such organs as were constituted thereby. This was all regular and legitimate. It corresponded to the political consciousness and the political system of the age, and to the universally recognized prerogatives of the English crown. There is no fault to find with it, therefore, from a true historical and cosmopolitan standpoint, and we should not regard it from any other standpoint.

Now the next step. The impatient commentator answers, rebellion, revolution. No, it was not. It was the development of a sentiment of national unity and independence throughout the population resident within the thirteen colonies along the Atlantic coast, from New Hampshire to Georgia; then the assembly in Philadelphia of the representatives of this entire population for consultation in regard to the wrongs which they fancied the central government¹ had perpetrated, or was about to perpetrate, upon them — wrongs which appear so doubtful, in themselves considered, that an unprejudiced mind feels forced to look deeper for the cause of the disaffection, and does not fail to find it, either in the growing consciousness of nationality. The great Frenchmen, Turgot and Choiseul, had it right, twenty years before the declaration of '76, when they argued, no matter what might be the attitude of Great Britain toward her North American colonists, the result would be the same. They were one whole and separate nation, fast becoming adult, and no matter how mild the government of the

¹ The British government, the Home government.

crown over them, it would soon be felt to be foreign rule. But I must not lose the point of significance to our question; *viz.*, that this assembly of the young Nation's representatives it was which protested first, then waged war against the royal sovereignty and government; and, finally, after two years of existence, declared, as the representative of the whole People, and by the authority of the whole People, the independence of the *United Colonies*. What now was the relation of the individual colony to the Nation, and to the Nation's representative — the Continental Congress? The united People had, through the Continental Congress, asserted their sovereignty. They were organized only in that Congress. They had not as yet made any constitution vesting powers or reserving powers or withholding powers. We must, therefore, determine the powers of the Continental Congress by regarding it as the organization of the People, and the successor to the British government. In the former capacity it was sovereign constituting power. In the latter it was central government, authorized by the general principles of the devolution of powers to succeed to all of the powers exercised by the King and Parliament over and in the colonies: *viz.*, the functions of international government; of intercolonial government; and the right of participation in the purely internal government of most of the colonies, through the veto power upon the acts of their legislatures, the ultimate revision of the decisions of their higher courts, and the appointment of their governors and chief judicial officers. In the former capacity, it might and should have constituted a new system of governmental organs, both central and local, with such reservations of rights and distributions of powers as it judged conducive to the welfare of the whole people; while in the latter it should have governed with all the powers of both crown and Parliament until the new system was ready. By all the reasons of political science and the natural devolution of powers, this was the position of the Nation and its representative, the Continental Congress, on the one side, and of the commonwealths and their local governmental establishments on the other; and there were at the moment no other

reasons and norms by which to measure these relations.¹ Such was the general feeling during the first moments subsequent to the "Declaration." This was manifest from the appeals of the existing authorities of the old establishment in the colonies to the Continental Congress for direction in regard to how their local governments should be re-organized after the expulsion of the royal supremacy — in reality, for authority to re-organize them — and from the acts of the Congress authorizing them to proceed, upon the basis of the widest possible suffrage, to a provisional re-organization.² Under this permission and advice, conventions of the people resident within the several colonies began the work of framing paper constitutions for their local governments,³ while the Continental Congress, busy with the waging of the war to maintain the declared independence, delayed the construction of a constitution for a permanent central government which should define the relation of the Nation and its general representative to the states and the state-governments. This was the fatal error. All powers were, so to speak, in the air; and the state conventions, by proceeding first to the formation of written constitutions, got the pick, and in half a decade the leavings were few enough; so that when the plan of the new central government, drafted by the Continental Congress itself, came to be established in 1781, it presented the system of separately sovereign and independent states — sovereign and independent now as against *each other*, and not, as

¹ It seems to me that one of the most fatal mistakes frequently made in the treatment of our constitutional history is the insufficient regard paid to the place and importance of the Continental Congress. Its temporary character, and its failure to grasp, at the right moment, all the powers which the people were ready to recognize to it, are undoubtedly among the causes which have produced this lack of historical appreciation; but, as students of political science, we must not confound its powers with its acts, nor its representative position with the views of its members. Viewed from the standpoint of political science, it was the most sovereign organization which our history has ever produced — the Nation's organ in revolution. Both Story (vol. I., p. 140, 4th ed.) and Curtis (vol. I., p. 40) accord it this position; but even they do not, it appears to me, draw from the proposition the full conclusions, in detail, which a sound and consequent logic requires.

² Curtis, *History of the Constitution*, vol. I., pp. 36, 37.

³ Connecticut and Rhode Island, not being under the necessity of providing new organs of administration, since the king did not appoint their governors and judges, framed no constitutions at this juncture.

the Declaration had it, *unitedly* sovereign and independent as against *Great Britain* — and connected with each other by a league of friendship.¹ According to this system, there was no Nation, and the government which it established was no representative of the Nation; it was but a congress of joint commissioners. From provinces of the British crown, these colonial establishments had now become, in name and theory at least, sovereign and independent states. Here certainly was mutability, construction and destruction. No one can possibly claim that the relation of local to central power in our system had not undergone within less than a decade a complete transformation. The constitution declared the relation now unchangeable save by the consent of every state given through its legislature.² So far as the paper constitution was concerned, this system of sovereign states in league was made immutable. In fact, it lasted just eight years, and was then overthrown by revolution. The states had usurped the powers of the Nation. They had planted themselves upon ground false to philosophy, false to history, and false to physical and ethnical relations. These powers must be wrenched from them, and they forced back into their proper subordination. But how could it be done? The existing law provided: Only upon proposition of the Congress ratified by each and every state through its legislature.³ This method was tried in modest demands, and failed every time.

At length two far-seeing spirits divined the means of escape from the unbearable situation. These two were Bowdoin and Hamilton; and their argument was: The states have usurped the sovereignty of the *people of the Nation*, and the *People* must reassert their sovereign power. But this was revolution — revolution against usurpation. Bowdoin boldly proclaimed it by securing from the Massachusetts legislature an instruction to the delegates sent by it to the Confederate Congress to move in that body for the summoning of a convention of the people of the whole Confederacy to revise the constitution.

¹ Articles of Confederation, arts. ii., iii.

² Articles of Confederation, art. xiii.

³ Ibid.

But these delegates were so frightened at the revolutionary character of the proposition, that they disobeyed the command of the legislature which sent and instructed them, and never presented the project at all.¹ On the other hand, the more politic Hamilton had recourse to one subterfuge and another; until at last, chiefly through his shrewd manipulation of opportunities, the best talent of the Nation was brought together in secret convention, and persuaded to frame a constitution withdrawing from the states the greater part of the usurped powers, and to make appeal to the people of the Nation to establish it. The People answered with sufficient unanimity, Yea, and the Nation reasserted its sovereignty. What now was the relation between the states and the Nation in the new system? The most superficial comparison of the new constitution with its predecessor manifests the immense change which had been wrought in this respect.

In the first place, *sovereignty* could no longer be claimed as a state attribute, nor *separate* independence. Sovereignty resided alone in the *people* of the whole Nation, and a state could be legally bound in organic changes against its will.² In the second place, it withdrew all of the really political functions from the states, and vested them in the Nation's governmental representative, *viz.*, the powers of war and peace, of diplomacy and commerce, the regulation of internal intercourse, of finance and the monetary system, of the military system,³ and of the local governmental system.⁴ It left to the states thus mainly jural and police functions. So thorough-going was the change

¹ Bowdoin's Message of May 31, 1785. Curtis' History of the Constitution, vol. I., p. 336 ff.

² Preamble to the Constitution of 1787 and art. 5.

³ Constitution of 1787, art. I, sec. 8.

⁴ The requirement (art. 4, sec. 4) of the present constitution that the United States shall preserve republicanism in the state governments vests in Congress the power to determine in what republican forms and institutions consist, *i.e.*, to prescribe the only legitimate form of local government which the Nation suffers to exist. This is the necessary conclusion from the language of the constitution certainly, and also from the reasoning of Chief-Justice Taney in the case of *Luther vs. Borden* in 7 Howard, U. S. Reports. The Congress has exercised the power in every enabling act and in the reconstruction acts of 1867.

which the relation between state and Nation now suffered, that we cannot longer properly speak of our local organizations as states, but as commonwealths, *i.e.*, local governments containing, under the sovereignty of the Nation and the supremacy of the Nation's general governmental representative, a large element of self-government.

Here certainly was mutability again to the degree of revolution. Here was destruction to the sovereignty of the states and construction in the reestablishment of the sovereignty of the Nation. For seventy-two years, only the span of a single human life, we lived under this system and this relation of commonwealths to Nation. For seventy years we imagined it permanent and perfect, when suddenly the iron logic of events demonstrated the fact that still too much had been left under the control of the local organizations, and that the Nation must narrow still further their sphere of action. It now placed bounds to their wide-reaching powers in the domain of the jural and police relations, by making citizenship national, decreeing the equality of civil rights, and limiting the whole of their authority by the principle of the due process of law as interpreted by the national judiciary.¹ Here was another immense change in the relation of commonwealth to Nation. There is now really nothing further necessary in the domain of constitutional law to enable the Nation's governmental organs to nationalize, in fundamental principle, the whole of our *private* law, just as there is nothing further necessary than the existing provision imposing upon these organs the duty of maintaining republicanism in our local forms, to enable them to nationalize at almost every point, the whole of our *public* law. By this last change the commonwealths have been substantially assigned to the office of administering the system of private law between persons resident within their bounds and supplementing its defects, and exercising the police power in behalf of the community against the too wide extension of individual rights — all upon the basis, however, of fundamental principles prescribed by the Nation, and upheld by the Nation's organs of central

¹ Constitution of the United States, Fourteenth Amendment.

government. In the way, however, of their complete relegation to this position stand three things. The first is their large control, legislative and administrative, over the elections of the organs of the central government. The second is the election of the members of the national senate by the commonwealth legislatures. And the third is the equal representation of the commonwealths in the national senate. The first may be changed, except as to the election of the electors for the national executive, by a simple law passed by the national legislature.¹ The second, and that part of the first not subject to the legislation of Congress, may be changed by the general process of amendment prescribed in the constitution.² But the third is the stronghold of confederatism, and most probably cannot be changed save by a revolutionary act.³ They are all relics of the usurpation of 1781. Whatever show of reason existed for any of them⁴ has largely passed away, and is now on the point of totally disappearing; and when the people come clearly to see that this intermeddling with the politics of

¹ Constitution of the United States, art. I, sec. 4, and art. 2, sec. 1, par. 2.

² *Ibid.*, art. 5.

³ *Ibid.*

⁴ It will be remembered that neither in the Randolph resolutions nor in Pinckney's draft of a constitution, nor in Hamilton's plan of government, offered to the convention of 1787, was the choice of the senators by the state legislatures or the equal representation of the states in the senate recommended; but that election of the members of the second branch by those of the first was the idea of both Randolph and Pinckney, while Hamilton suggested that their choice should proceed from the people through indirect election, and all three made population the basis of representation in both houses. It will also be remembered that the whole convention in committee voted for representation in both houses according to population, *i.e.*, "whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes"; and finally, that when the proposition for equal representation was adopted after much opposition, it was so done by the votes of the delegates from only five states, *viz.*, Connecticut, New Jersey, Delaware, Maryland, North Carolina — the delegates from only ten states having voted, four against and one divided. — *Elliot's Journal of the Federal Convention*, pp. 143, 144, 146, 179, 182, 206. That is, before the spirit of compromise with petty or unworthy interests or both had won the day, the reasons for the constitution of the senate finally adopted had not prevailed. The abolition of slavery, the increase of population, and the network of railway and telegraph have now about destroyed the conditions which prompted the demand for the compromise.

the Nation is what prevents the commonwealths from properly discharging their proper functions in jural and police administration, the spirit will hardly be lacking to proceed to the transformation. For ten years now we have been passing through a period of reaction against the pronounced nationalism of the previous fifteen ; but we shall come to the end of it, and the precedents are not wanting in our history to point the way for the still further nationalization of our political institutions.

But this is not yet all. There is still another standpoint from which to view the rapid and constant changes in the constitution of our "indestructible and immutable states." We have been considering what the people of the Nation have been doing to the commonwealth ; let us now contemplate the changes which the people resident within the limits of the particular commonwealth have been imposing upon its governmental organization. And right here let me point out the fact that there is no true parallelism in the relation of the Nation and the commonwealth to their respective governmental organizations. The commonwealth really exists only in its governmental organization, while the Nation has a physical and an ethnical existence as well as a governmental. There is really no such thing as the people *of* a commonwealth, in a sound view of our political and social system ; there is only the people of the Nation resident *within* the commonwealth. The People is a national conception, and preserves its integrity against government only as Nation. Blot out the national government, and you still have the Nation physically and ethnically, which, by its own innate power, will restore its political organization ; but blot out the government of the commonwealth, and you have a territory measured by the chain of the surveyor, with a population governed exclusively by the Nation's organs, and restored to local self-government only by the Nation's act. This is really, though probably not consciously, what every judge means when he says : "To the government of the United States that which has not been granted is denied ; but to the governments of the states that which has not been denied is granted." The commonwealth is purely a creation of law, and is identical with its

political organization. I am endeavoring by this analysis to lead the mind of the reader up to the proposition that, when the people resident within a commonwealth withdraw powers from the government of the commonwealth, the result is practically a change in the position of the commonwealth, and not simply a redistribution of powers between different organs of the commonwealth.

Now let us see what has been done in this direction during the last hundred years. Let us contrast the older constitutions with the new. Briefly we may outline one of the earlier forms as follows. It consisted first of a bill of rights, defining in general terms the right of the individual to the security of his person and property, to his freedom of opinion, expression, and conscience, and defending him against any arbitrary act by the government for their abridgment. In the second place, it constructed the organs of government: a legislature of two houses, each with full control over its own organization and procedure, chosen by the people, meeting annually, and having unlimited power of legislation upon all subjects not forbidden by the bill of rights or by the provisions of the national constitution or the acts of the national government; an executive, chosen likewise by the people, having the power to nominate almost every important officer in the commonwealth, administrative and judicial, and exercising a large power of dismissal and a large discretion in the administration of law; and a judiciary holding by the tenure of appointment, and for the term of good behavior; and lastly, it contained a provision for its own amendment or revision or both.¹ It was a plain and practical instrument; and the government constituted by it was a strong and vigorous organization. Now contrast with this the constitutions framed during the last twenty-five years, either for new commonwealths or as revisions of the older forms. The first thing that will strike the observer is the great bulk of these new instruments. When he looks into

¹ Massachusetts and New York. In some of the states the legislature was all-powerful, electing both the executive and the judiciary; *e.g.*, Virginia, North Carolina. — *Poore's Constitutions*.

them, he will find some difficulty in determining whether he is reading a constitution or a statute book or a treatise on parliamentary law; and a careful examination will reveal the immense decrease in the dignity and power and energy of the governmental organizations therein established. In the first place, the legislatures constituted in nearly all of them have been confined to biennial sessions, which means of course that the people want as little legislation and as little expense for legislation on the part of the commonwealth as possible. Some thirteen¹ of them prescribe the number of days beyond which the legislature shall not remain in session; and one² declares that if it passes the limit, the members shall receive no pay for the extra time. There is no doubt that this is all degrading to the dignity of the legislature, and tends to create or increase the feeling among the people, that it is something to be gotten rid of so far as possible. In the second place, the legislatures established by nearly all of these constitutions have been deprived of the control of the fundamental rules of their own procedure, and the constitutions themselves stuffed with such details of parliamentary law as the following examples will illustrate. No law shall be enacted except by bill.³ No bill shall contain more than one subject except general appropriation and revenue bills or a digest or revision of statutes.⁴ The subject of each bill shall be expressed in the title.⁵ Every bill in reference to a tax must distinctly state the tax and its purpose.⁶ Appropriation bills shall contain only the appropriations for the ordinary expenses of the government, interest on the public debt,

¹ Alabama, Arkansas, California, Colorado, Florida, Georgia, Indiana, Kentucky, Louisiana, Maryland, Nevada, Virginia, and West Virginia.

² California.

³ Alabama, Arkansas, California, Colorado, Maryland, Missouri, Nebraska, Pennsylvania, Texas, Wisconsin.

⁴ Alabama, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

⁵ Alabama, California, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

⁶ New York.

and appropriations for the common schools.¹ All special appropriations must be by separate bill, and contain but one subject.² All bills shall be read upon three different days before passage.³ All bills must be printed for the use of the members, before final passage.⁴ All bills must be read at length upon the final passage.⁵ No bill shall be so altered in the process of passage as to change its original purpose.⁶ All laws revived, amended, or extended must be reenacted at length, and not merely referred to by title or description⁷ — and so on *ad infinitum*. In all this it is unmistakably manifest that the popular dissatisfaction with and suspicion towards the legislature are seeking to find safeguards against the ignorance or rashness or corruption of the legislators by introducing the fundamental principles of parliamentary procedure into the constitution.

In the third place, the legislatures in nearly all of these recent instruments have been deprived of their previously almost unlimited powers of legislation upon most important subjects, such as the raising and appropriating of money, the exercise of the right of eminent domain, and the creation of corporations. In the earlier constitutions, about the only restriction placed upon the exercise of these great powers was that private property should not be taken for public use without a just compensation being rendered therefor; but a volume would be necessary to recite the limitations contained in the later forms in regard to these subjects. Here are some of the

¹ Alabama, Arkansas, California, Colorado, Florida, Georgia, Illinois, Louisiana, Nebraska, Pennsylvania.

² Alabama, Arkansas, California, Georgia, Louisiana, Pennsylvania.

³ Alabama, Arkansas, California, Colorado, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia.

⁴ California, Colorado, Illinois, Maryland, Missouri, Nebraska, Pennsylvania.

⁵ Alabama, Arkansas, California, Colorado, Illinois, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New York, Oregon, Pennsylvania, Tennessee.

⁶ Alabama, Arkansas, Colorado, Missouri, Pennsylvania, Texas.

⁷ Alabama, Arkansas, California, Colorado, Florida, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan, Missouri, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Texas, Virginia, West Virginia.

examples. The legislature shall tax all property *ad valorem*.¹ The legislature shall exempt only municipal, educational, religious, and charitable corporations or associations from taxation.² The legislature shall exempt educational, religious, and charitable corporations from taxation only in regard to the lands, buildings, and furnishings actually used in the prosecution of their legitimate purposes.³ The legislature shall tax corporations by the same rate as individuals.⁴ The legislature shall levy no tax greater than three-fourths of one per cent in any one year.⁵ The legislature shall have no power to borrow money except for the purpose of meeting an accidental deficiency in the revenue, repelling invasion, and suppressing insurrection.⁶ The legislature shall not loan the credit of the state to any private person or association or corporation.⁷ The legislature shall not appropriate the money of the state to internal improvements.⁸ The legislature shall authorize the formation of no corporation under a special law.⁹ The legislature shall

¹ Alabama, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia, Wisconsin.

² Alabama, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Minnesota, Missouri, Nebraska, Nevada, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia.

³ Same as last.

⁴ Alabama, Colorado, Florida, Illinois, Iowa, Kansas, Mississippi, Nevada, Ohio, Pennsylvania, Texas.

⁵ Alabama; Arkansas, one per cent; Colorado, three-fifths of one per cent; Louisiana, one and one-fourth per cent; Missouri, one-fifth of one per cent in addition to amount necessary to pay interest on the public debt; Texas, one-half of one per cent in addition to amount necessary to pay interest on public debt.

⁶ California, Colorado, Florida, Illinois, Kansas, Maryland, Missouri, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Virginia, West Virginia, Wisconsin.

⁷ Alabama, Arkansas, California, Colorado, Florida, Georgia, Illinois, Iowa, Maryland, Michigan, Minnesota, Mississippi, Missouri, Ohio, Pennsylvania, Tennessee, Texas, Virginia, West Virginia, Wisconsin.

⁸ Alabama, Michigan, Minnesota, Virginia, Wisconsin.

⁹ Arkansas, California, Colorado, Florida, Illinois, Kansas, Louisiana, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, West Virginia.

charter no bank for more than twenty years.¹ The legislature shall pass no law authorizing a banking corporation to issue bills of credit,² *i.e.*, paper money, nor to suspend specie payment.³ The legislature shall pass no law assuming the liabilities of any corporation,⁴ or releasing the indebtedness of a corporation to the commonwealth,⁵ or authorizing the taking of stock in any corporation by the commonwealth.⁶ The legislature shall pass no law surrendering the power of eminent domain over corporate property or any other property.⁷ These are not a tithe of the limitations upon these four subjects; and to these must then be added scores of provisions prohibiting absolutely legislative action in regard to certain subjects, requiring it absolutely in regard to others, fettering special legislation, and making wide-reaching exceptions from its scope of action — a dreary and wearisome waste through which no reader can be led and kept awake, but in which the indices all point in one direction. It cannot be doubted that we have in all this a great decline in the dignity, influence, and power of the commonwealth legislatures, and therefore of the commonwealths themselves. It is unmistakable that a stronger consciousness of nationality, a larger confidence in the national government, and a pronounced distrust of the commonwealth governments have taken possession of the whole people, and are now realizing themselves in the constitutional and legal transformations of our entire political system.

In the fourth place, these more recent constitutions weaken the power of the commonwealth governor. It is true that, in the earliest instruments framed subsequent to 1789, the gov-

¹ Alabama, Indiana, Pennsylvania.

² Alabama, Arkansas, California, Illinois, Indiana, Iowa, Kansas, Minnesota, New York, Pennsylvania.

³ Illinois, Indiana, Iowa, Michigan, Minnesota, New York.

⁴ Indiana, Iowa, Missouri.

⁵ Missouri, Pennsylvania, Texas, Virginia.

⁶ Arkansas, California, Colorado, Florida, Georgia, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, Nevada, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, West Virginia.

⁷ Arkansas, California, Colorado, Georgia, Illinois, Missouri, Nebraska, Pennsylvania, West Virginia.

error was restored in large degree to powers lost during the period of the Revolution, and that during the first three or four decades of the present century he seemed to hold his own. It is also true that his independence of the legislature was worked out through the constitutional developments between 1789 and 1840, and has been preserved as a permanent principle, and that a longer term has been accorded him ; but from the fifth decade of the century to the present, the tendency has been to limit his administrative discretion, hedge in his pardoning power, narrow the scope of his power to appoint and dismiss by making the officers of the commonwealth and especially of its municipal divisions elective by the voters, and to place him under the surveillance of a cabinet of elective officers, not necessarily in political accord with him, whose duty it is to record his acts and report the same to the legislature. More than ten years ago, Governor Bullock of Massachusetts raised the complaint that the governor's position in that commonwealth was no more what it had been in the earlier days. But a survey of the constitutions of all the commonwealths will show that the change in this respect in Massachusetts has been less than the average. We may affirm, I think, that he has lost far less than the legislature during the last forty years ; which is one more evidence of the fact that the true sphere of the commonwealth government is administration rather than legislation. Nevertheless, he is not regarded either by the whole Nation or by the part of it resident within the particular commonwealth as the important personage that he was before 1861.

In the fifth place, these recent constitutions have decreased the dignity and influence of the commonwealth judiciary. In the older organizations the judges generally held by the tenure of appointment, or election by the legislature, and for the term of good behavior. In the later forms, on the other hand, they hold by popular election, and for a short term of years. I cannot comprehend how any one who has studied, with any degree of thoroughness, the *personnel* of our commonwealth judiciaries, or the decisions proceeding from them, can hesitate

for a moment in pronouncing a decline of intelligence and conscience in this, with us, most fundamental department of government. The filth of an electoral campaign, a short term and a petty salary, are poor attractions for men of great learning, austere morals and reserved habits. This change in the character of the judicial systems of the commonwealths has been one of the forces contributing to create the impulse, manifest in many quarters, to go to the national courts when, upon any principle or pretext, their jurisdiction can be invoked. It may be affirmed that the judiciary, as well as the executive, gained something in power as against the legislature in the period from 1789 to 1840, for it too, as a royal institution, had suffered severely during the Revolution. It may also be asserted that, between 1840 and the present, it has lost less ground, by constitutional limitation, than the legislature or the executive. This is again evidence of the principle that the sphere of the commonwealth government is administration rather than legislation, and judicial administration more than executive administration. But the power which springs from the permanency of the judicial office, as well as its dignity and influence, has suffered decline in all of the recent forms.

Lastly, these more recent instruments contain provisions constitutionalizing the municipal divisions of the commonwealth, *i.e.*, defending them, in greater or less degree, against the power of the government of the commonwealth, securing their boundaries,¹ establishing their organizations, defining their powers, prescribing the tenure and duties of their officers,² *etc.* This is a most serious question. It demonstrates the fact that the government of the commonwealth has ceased to be, in many respects, the *natural* local government. It threatens the gradual dissolution of the commonwealth through the consolidation of the municipalities.³ It appears to me that while the legis-

¹ *E.g.*, Missouri, Nebraska, Ohio, Texas.

² *E.g.*, Alabama, Arkansas, California, Colorado, Illinois, Indiana, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Texas, Virginia, West Virginia, Wisconsin.

³ Counties and cities.

lative and judicial powers exercised at the beginning of the century by the governments of the commonwealths are gravitating towards the national government in greater or less degree, the police powers, on the other hand, are passing over to the municipalities, and that this result is being produced as much by dissolution from within as by centralization from without, if not more. I do not believe that this is a pendulum-swing towards one extreme to be followed by a return to the other. The transformation rests upon a change of natural conditions and forces, which now manifest only a tendency to intensification in the same direction. We may describe the change simply and briefly as follows. When the colonies were planted by Great Britain upon the Atlantic shores, it was in the form of communities widely separated from each other by tracts of wilderness, in which roamed the savage and the wild beast. When they became states, these communities had encroached a little upon the surrounding wildernesses separating them from each other, and had made a few bad wagon-roads in some places through the same, and a man might travel overland from one to another, or get a communication through, in about the time required for a modern steamship to go from New York to Liverpool, and with much greater hardship and danger. The really settled portion of a state at the date of the Revolution was about the extent of a good large county, or, at most, of two or three counties. The state government was therefore, at that time, real local government. But now these vast tracts of wilderness separating the original states have all been levelled. The parent communities have sent out thousands of offspring to form new communities within the waste, while thousands of other communities have been established having no such natural connection with the original settlements; and all of them are bound together by the network of bars and wires, which enables a man to live in any one of them, and be in constant communication with anybody living in any other. No one knows now, by anything which nature has to show either in geography or ethnology, when one

crosses the line which separates two commonwealths from each other.¹

The two natural elements in our system are now the Community and the Nation. The former is the point of real local self-government; the latter that of general self-government; and in the adjustments of the future these are the forces which will carry with them the determining power. The commonwealth government is now but a sort of middle instance. Too large for local government, too small for general, it is beginning to be regarded as a meddlesome intruder in both spheres—the tool of the strongest interest, the oppressor of the individual. This has been its history in other lands and other times; and the mere fact that it professes to be popular here, while it has been princely or aristocratic elsewhere, will not save it from the same fate.

Putting together all these principles, facts and tendencies—physical, ethnological, historical, legal, and political—how can we any longer declare the cardinal doctrine of our system to be “an indestructible union of indestructible and immutable states”? Are we not dealing in mere abstractions when we say so? Are we not giving way to an exaggerated Platonism in our political philosophy—attempting to substitute ideas *for* things, instead of seeking to find ideas *in* things? Are we not grinding out an old tune, from which the melody has long since departed? In a word, have we not completed our Federal era and attained the natural condition of a real national system—conditions which not only permit it but require it? And if this be true, in any degree, with regard to our present status, will it not be so in a much higher degree fifty years from now? It seems to me that it must. It seems to me that, in the twentieth century, the commonwealth will occupy a much lower place in our political system, the Nation a much higher, and the municipalities a much more distinct and independent sphere. It seems to me that we shall then, if not before, be

¹ This is not quite true, as I have already indicated, should the line traversed be that of the Rocky Mountain range; but in regard to the territory lying east of that boundary, this assertion may be made without qualification.

compelled to reformulate our cardinal doctrine, and that it will read : the Nation, sole and exclusive sovereign, distributing the powers and functions of government between central organs, commonwealth and municipality ; and defining, guaranteeing, and defending the fundamental principles of the civil right — in accordance with the dictates of the Nation's political and juristic policy. This sounds rather jejune, I confess, when compared with the grandiloquence of the other statement ; and I have no expectation that the view thus expressed will meet with any general acceptance at this moment. As I said at the outset, I have not proposed to play the role of the propagandist. My object is not, at this time, to inspire belief, but to excite skepticism ; and if I have accomplished this in a single mind, I am content : for I shall have aroused in that mind the spirit of independent research in politics ; and, according to my scholastic arithmetic, one capable and conscientious inquirer counts for more than a hundred disciples.

JOHN W. BURGESS.